UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF NEW YORK

In re
Alfred E. Diamante,

Debtor

Case No. 94-12133
Chapter 7

Alfred E. Diamante,

Plaintiff

-against-

Solomon & Solomon, P.C.,

Defendant

Adversary No. 99-91137

APPEARANCES:

Richard DiMaggio
Attorney for the Plaintiff
P.O. Box 104
Clifton Park, New York 12065

Solomon & Solomon, P.C.
Columbia Circle
Box 15019
Albany, New York 12212

Douglas Fischer, Esq.
Of Counsel

Hon. Robert E. Littlefield, Jr., United States Bankruptcy Judge

MEMORANDUM-DECISION-ORDER

The limited issue presented in this case is what procedural requirements must be met when requesting the imposition of sanctions pursuant to Bankruptcy Rule 9011.

JURISDICTION

The court has jurisdiction over the parties and the subject matter pursuant to 11 U.S.C. §105(a) and 28 U.S.C.§ 157(b)(2)(G).

FACTS

Based upon the pleadings before it, this court finds that the facts are as follows:

(1) On June 9, 1994, the Plaintiff/ Debtor (hereinafter "Plaintiff") filed a voluntary Chapter 13 petition. The first meeting of creditors was set for July 28, 1994, and the last day to file a proof of

claim was October 26, 1994.

(2) On December 6, 1995, the Plaintiff moved to convert his case from Chapter 13 to Chapter 7. The first meeting of creditors for the Chapter 7 case was scheduled for February 9, 1996. The Plaintiff's Chapter 7 attorney was Mark S. Ehrlich, Esq.

(3) The Plaintiff's original petition omitted a debt owed to the Monogram Bank. This debt had been placed for collection with Solomon and Solomon, P.C.

(4) On January 26, 1998, the Plaintiff filed an amended schedule that listed the debt to Monogram Bank.

(5) Upon receipt of the amendment, the Defendant/Creditor (hereinafter "Defendant") sent a letter to Mr. Ehrlich indicating that they viewed the debt as nondischargeable pursuant to 11 U.S.C. §523(a)(3). The Defendant did not take any follow-up action at that time.

(6) The Plaintiff received a Notice of Discharge on November 16, 1998.

(7) On or about May 6, 1999, the Defendant initiated a procedure whereby the Plaintiff's bank account at Pioneer Savings Bank was restrained.

(8) Upon receiving notification of the restraint the Plaintiff called Defendant and indicated that the debt had been discharged. On May 10, 1999, Mr. Ehrlich wrote the Defendant indicating that the Plaintiff had filed for and received a discharge in the bankruptcy case. Counsel for the Defendant telephoned Mr. Ehrlich and once again stated that in their opinion the debt was nondischargeable.

(9) Subsequently, the Defendant notified the bank that they were releasing the restraint. However, prior to the release of funds, the Plaintiff, through new counsel Richard Dimaggio, Esq., initiated an adversary proceeding by filing a complaint on June 1, 1999.

(10) The complaint listed three separate causes of action. These claims were:

(A) Count 1 - Wilful Violation of the Automatic Stay, pursuant to 11 U.S.C. § 362.[(1)]

(B) Count 2 - Intentional Infliction of Emotional Distress

(C) Count 3 - Conversion

(11) The complaint named as Defendants, Solomon & Solomon, P.C., as well as Valerie and Harold Solomon, individually. Ultimately Valerie and Harold Solomon individually were released as Defendants. Solomon & Solomon, P.C. remains as the sole Defendant.

(12) All Defendants promptly answered this complaint.

(13) On July 29, 1999, the Plaintiff made a Motion for Partial Summary Judgment. The Defendant countered with a Cross Motion to Dismiss and a Request for Fees pursuant to Rule 9011.

(14) On August 29, 1999, 21 days after the Cross Motion was submitted, a hearing was held to resolve these issues. During this hearing, this court advised the Plaintiff that because the discharge had occurred there was no automatic stay in effect, pursuant to 11 U.S.C.§ 362, when the Defendant restrained the Plaintiff's bank account. Since there was no section 362 stay, there could be no violation. Plaintiff's counsel then "withdrew" the motion.

(15) Having determined that there was no violation, this court refrained from deciding the merits of the remaining counts of the complaint. However, this court reserved jurisdiction to determine the request for sanctions pursuant to Rule 9011.

ARGUMENTS

The Plaintiff's attorney argues that the defendant is not entitled to fees or sanctions because it did not follow the explicit procedure dictated by Rule 9011. Plaintiff's counsel relies upon the "safe harbor" provision of the statute and argues that the complaint was "withdrawn" exactly 21 days from the date the Defendant filed the motion requesting sanctions.

The Defendant argues that although he did not strictly comply with the "safe harbor" provision, the underlying purpose of the statute has been satisfied. Defendant advances that the "safe harbor" provision is a due process requirement and that the Plaintiff's attorney was given ample notice of, and had the opportunity to address, the request for sanctions.

DISCUSSION

Federal Bankruptcy Rule 9011, incorporates Rule 11 of the Federal Rules of Civil Procedure, and states, in part:

> (c) SANCTIONS. If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the violation.
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> (1) How Initiated.
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> (A) By Motion. A motion for sanctions under this rule shall be made separately from other motions or requests and shall describe the specific conduct alleged to violate subdivision (b). It shall be served as provided in rule 7004. The motion for sanctions may not be filed with or presented to the court unless, within 21 days after the service of the motion (or such other period as the court may prescribe), the challenged paper, claim, defense, contention, allegation, or denial is not withdrawn or appropriately corrected, except that this limitation shall not apply if the conduct alleged is the filing of a petition in violation of subdivision (b).

The Defendant did not comply with the plain language of the statute. It included the request for sanctions in a cross motion, and therefore, the motion was not made separately from other motions. Furthermore, the Defendant filed the motion with the court before serving it upon Plaintiff's counsel. Plaintiff's counsel contends that this procedural defect is fatal.

As noted earlier the Defendant contends that the procedure was enacted to satisfy due process requirements and that because the Plaintiff was on notice for the request for sanctions the requirements of due process were met. This court understands and appreciates the argument proffered by the Defendant. However, the law is clear and consistent and this court's research has uncovered no case in which any court has excused a party from complying with the "safe harbor" provisions of Rule 9011 or Rule 11 *See Hadges v. Yonkers Racing*

Corp., 48 F.3d 1320 (2nd Cir. 1995)(Failure to provide safe harbor period as required by Rule 11 requires reversal of sanctions imposed); *Tornheim v. Federal Home Mort. Corp.,* 988 F.Supp. 279 (S.D.N.Y. 1997)(Request for Rule 11 sanctions denied without respect to merits when request included in summary judgment motion papers, rather than as a separate motion); *Photocircuits Corp. v. Marathon Agents, Inc.*, 162 F.R.D. 449 (E.D.N.Y. 1995) (Failure to comply with safe harbor provision requires denial of motion); *In re Russ* 218 B.R. 461 (Bankr. D. Minn. 1998) *aff'g in part rev'd in part on diff. grnds* 1999 WL 608629 (8th Cir. 1999)(Failure to comply with safe harbor provision of Rule 9011 and filing motion with the court prior to expiration of 21 days was itself sufficient to deny motion); *In re Talon Holdings, Inc.*, 1999 WL 150337 (Bankr. N.D. Ill. 1999)(Failure to comply with safe harbor provision requires denial of motion); *DeShiro v. Branch*, 183 F.R.D. 281 (M.D. Fla. 1998)(Motion that did not comply with safe harbor provision is denied); *United States v. BCCI Holdings (Luxembourg), S.A.*, 176 F.R.D.1 (D.C. 1997)(Rule 11 sanctions will not be imposed when procedure is not complied with); *Progress Fed. Sav. Bank v. Lenders Assoc. Inc.,* 1996 W.L. 57942 (E.D. Pa. 1996)(Rule 11 motion denied on procedural grounds).

Relying upon the overwhelming case law in this area this court finds that not complying with the safe harbor provision of Rule 9011 is lethal to the request for sanctions, and therefore, the Defendant's motion must be denied.

This issue can be decided upon the procedural grounds. Therefore, this court will only briefly address the Plaintiff's illusory argument that the complaint was "withdrawn" within the 21 day "safe harbor" period. A review of the record indicates that both sides had an opportunity to be heard on these motions. This court then advised Plaintiff's counsel that there was no automatic stay violation pursuant to 11 U.S.C. § 362 when the Plaintiff's bank account was restrained. It was not until this court had made this determination that the motion was "withdrawn." Blacks Law Dictionary defines withdrawal, "Withdrawal of Charges. A failure to prosecute by the person preferring charges - **distinguished from a dismissal**, which is a determination of their invalidity by the tribunal hearing them." *See* BLACK'S LAW DICTIONARY 1436 (5th ed.1979)(emphasis added). The facts clearly support a determination that the Plaintiff's motion was dismissed not withdrawn.

PROPER PROCEDURE FOR RULE 9011 SANCTIONS

This court is confronted with numerous requests for sanctions pursuant to Rule 9011. Therefore, this court will take this opportunity to articulate the requirements that must be met before a request for sanctions will be considered. As noted earlier, Federal Rule of Bankruptcy Procedure 9011 integrates Rule 11 of the Federal Rule of Civil Procedure. The object of these rules was an attempt to curb and eliminate groundless and abusive litigation practices. *Progress Fed. Sav. Bank v. Lenders Assoc.,* 1996 WL 57942 (E.D. Pa. 1996).

The "safe harbor" provision was implemented as a 1993 amendment to Rule 11 of the Federal Rules of Civil Procedure. Bankruptcy Rule 9011 was amended in 1997 to conform with the Rule 11 of Civil Procedure. *See* Fed. R. Bank P. 9011; Fed. R. Civ. P. 11(c)(1)(A). The aim of the safe harbor provision was to reduce the escalating number of sanction requests that were being filed, to codify due process considerations and to diminish the chilling effect that the rule, prior to the amendment, had on legal theory and practice *Ridder v. City of Springfield*, 109 F.3d 288 (6th Cir. 1997).

The advisory committee notes that accompany the 1993 amendment to Rule 11 crystallizes the paramount importance that was placed upon the "safe harbor" provision. The notes aver:

> The rule provides that requests for sanctions must be made as a separate motion, *i.e.*, not simply included as an additional prayer for relief contained in another motion. The motion for sanctions is not, however, to be filed until at least 21 days ...after being served. If, during this period, the alleged violation is corrected, as by withdrawing (whether formally or informally) some allegation or

contention, the motion should not be filed with the court.

To stress the seriousness of a motion for sanctions and to define precisely the conduct claimed to violate the rule, the revision provides that the safe harbor period begins to run only upon service of the motion. In most cases, however, counsel should be expected to give informal notice to the other party, whether in person or by a telephone call or letter, of a potential violation before proceeding to prepare and serve a rule 11 motion.*See* Advisory Committee Notes to Fed. R. Civ. Proc. R.11, 1993 Amend.

> The plain language of the statute along with the advisory committee notes makes it clear that a certain procedure must be followed if sanctions are requested under Bankruptcy Rule 9011 or Federal Rule 11 of Civil Procedure. This court will not deviate from this directive. In order for a request for sanctions to be considered by this court the following general procedure must be followed:
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> (1) The attorney who believes that opposing counsel may be subject to sanctions should attempt to notify the alleged transgressor informally;
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> (2) If the alleged offending party takes no action, then the party requesting sanctions must serve a separate and distinct motion for sanctions upon opposing counsel; and
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> (3) If no action is taken within 21 days, then and only then can the party seeking sanctions file the separate sanction motion with the court.

This court is mindful that an inherent tension exists in Rule 9011. This tension arises from the fact that although a Rule 9011 request cannot be submitted to the court too early, such request cannot also be submitted too late. *See* Advisory Committee Notes to Fed. R. Civ. Proc. R. 11, 1993 Amend. In most cases this should not be a factor, however, there may be cases when a timing issue will arise. Keeping with tradition, this court is open to any type of creative resolution if a timing problem should ensue. However, in no case will this court condone a disregard of the statute's procedural requirements.

This court is not reinventing the wheel, rather it is giving effect to the plain language of the statute and respecting the intention of the advisory committee. This procedure is to be followed with respect to Rule 9011 sanctions. This decision does not affect a request for attorney's fees under any other section of the Code. If requesting costs or fees under another provision, of course, that specific section should be analyzed to determine the procedural requirements. In addition this decision does not pertain if this court, on its own initiative, determines that sanctions are appropriate in a certain situation. If this court chooses to impose sanctions on its own then it will follow the directive of Rule 9011.

Since the Defendant has failed to satisfy the procedural requirements of Rule 9011, the Defendant's motion for sanctions is DENIED.

It is so ORDERED

Dated: November 16, 1999
Albany, New York

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Hon. Robert E. Littlefield, Jr.
United States Bankruptcy Judge

1. Since a discharge had occurred the proper section to rely upon was 11 U.S.C. §524 not 11 U.S.C.§ 362. The Automatic Stay pursuant to 11 U.S.C. § 362 applies during the pendency of an action; The Automatic Stay pursuant to 11 U.S.C. § 524 applies post discharge.